In the High Court of Judicature at Madras

Dated:18-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.278 OF 1997

Muthu ..Appellant/Plaintiff

v

1. Chinnaswamy
2. Ammulu
3. Vaithi
4. Thaiyyal Nayaki
5. Perumal ..Respondents/Defendants
2,3,5,6 & 4

Second appeal filed under Section 100 of CPC against the judgment and decree dated 30.4.1996 made in A.S.No.142 of 1990 on the file of the Subordinate Court, Ariyalur reversing the Judgment and Decree dated 21.2.1990 made in O.S.No.471 of 1985 on the file of District Munsif's Court, Ariyalur.

For Appellant : Mr.M.S.Krishnan
for M/S Sarvabhauman Associates

For Respondents : No appearance.

JUDGMENT

The plaintiff in O.S.No.471 of 1985 on the file of Court of District Munsif, Ariyalur who has succeeded his case before the trial Court, having lost his case before the Court of Subordinate Judge, Ariyalur in the appeal preferred by the defendants, is the appellant herein.

2. The short facts of the case of the plaintiff in the plaint relevant for the purpose of deciding this appeal are as follows:
The suit is for declaration of title and for consequential permanent injunction. The plaintiff is the absolute owner of the plaint schedule property, which was purchased by him on 21.9.1985

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for a sale consideration of Rs 6,000/- from one Kulanthaivelu Padaiyachi. From the date of purchase itself, the plaintiff is in possession and enjoyment of the suit property. 66 cents on the east of the suit property belongs to the plaintiff. Only for the convenient enjoyment of his property, he had purchased the suit land which is situated on the east of 0.66 cents land. The defendants are brothers. The defendants have no land adjacent to the suit land. There is a long standing enmity prevailing between the plaintiff and the defendants. Only to harass the plaintiff, the defendants trespassed into the suit property on 20.10.1985 and attempted to cut and remove the standing crops therein. The said attempt of the defendants thwarted by timely intervention of the plaintiff. The defendants are denying the title of the plaintiff to the suit property. The defendants claim that they have purchased the suit property. Even if there is any sale deed in favour of the defendants, it is only nominal and it will not bind the plaintiff. Hence the plaintiff has filed the suit.

3. The second defendant has filed a written statement adopted by the other defendants as follows: The sale deed dated 21.9.1985 said to have been in the name of the plaintiff is the fraudulent document. It is a sham and nominal document. Now under the above said sale deed, the plaintiff cannot claim any right or title in respect of the suit property. The vendor of the plaintiff viz., Kulanthaivelu had no right or title to execute the sale deed dated 21.9.1985 in respect of the suit property in favour of the plaintiff. The defendants have neither made any attempt to trespass into the property nor made any attempt to cut and carry away the standing crops. The sale deed dated 21.9.1985 in favour of the plaintiff is void document. After knowing that the defendants have purchased the suit property, the plaintiff had created the document dated 21.9.1985 along with his vendor Kulanthaivelu only for the purpose of filing this case. Out of 2 acre 10 cents, 75 cents in Survey No.418/2 originally belonged to one Duraiswamy, his wife Meenkashi Ammal and their son Kulanthaivelu. The four boundaries for the said property are as follows: Northern boundary for the suit property is the land belonging to Sivan Temple; eastern boundary for the suit property is land belonging to Subbarayan; Southern boundary for the suit property is a road and western boundary for the suit property is the land belonging to Muthu (Plaintiff). The entire 75 cents in the suit survey number property was sold by the above said Duraiswamy, his wife Meenakshi Ammal and their son Kulanthaivelu under the sale agreement dated 4.2.1985 for a sum of Rs.29,000/- On the date of agreement itself, the possession of the above said 75 cents was handed over to the defendants . As per the recitals in the said sale agreement dated 4.2.1985, the defendants have paid a sum of Rs 9,000/- to their vendor . Out of the balance of sale

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consideration of Rs.20,000/- on 16.6.1985 , a sum of Rs.5,000/- was paid by the defendant to their vendor and the balance of Rs 15,000/- was paid by the defendants to their vendor on 20.9.1985 ie., on the date of registration of the sale deed before the Registrar. The defendants have raised crops in the said land and harvested the same, afterwards they have raised black gram in the suit land. After knowing full well the execution of the sale agreement and about the registration of the sale deed dated 29.9.1985 in pursuance of the sale deed dated 4.2.1985, the plaintiff in connivance with one of the vendors of the defendants viz Kulanthaivelu have created a sale deed in respect of the suit property on 21.9.1985. After the transfer of possession in favour of the defendants, mutation has been effected and patta was also granted in favour of the defendants. Hence, the suit is liable to be dismissed.

4. The plaintiff has filed a reply statement dening the averments in the written statement.

5.. On the above pleadings the trial Court had framed seven issues. The plaintiff has examined himself as P.W.1 and also examined P.W.2 and P.W.3 on his side. The second defendant has examined himself as D.W.1 and also examined D.W.2 to D.W.5 on their side. Exs P1 to P7 were marked on the side of the plaintiff and Exs B1 to B6 were marked on the side of the defendants.

6. The suit was decreed on 27.8.1997. On an earlier occasion, against the decree and Judgment an appeal was preferred before the Court of Subordinate Judge, Ariyalur in A.S.No.145 of 1987 and as per the Judgement of the first appellate Court dated 18.11.1989, the matter was remanded to the trial Court and after remand, D.W.6 Balakrishnan was examined on the side of the defendants but no new document was produced on either side and no further witness was examined on the side of the plaintiff.

7. After going through the documentary and oral evidence, the learned trial Judge has decreed the suit with costs. Aggrieved by the findings of the learned trial Judge, the defendants have preferred an appeal before the Court of Subordinate Judge, Ariyalur in A.S.No.142 of 1990 who after due deliberation on the respective contentions of the parties, has allowed the appeal thereby setting aside the decree and judgment of the learned first appellate Court in A.S.No.142 of 1990 thereby dismissing the suit in O.S.No.471 of 1985 on the file of the Court of District Munsif, Ariyalur. Aggrieved by the findings of the learned Subordinate Judge, Ariyalur, the plaintiff has preferred this second appeal.

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8. The substantial question of law involved in this appeal is

> " Whether the lower Appellate court is correct in law reversing the well considered judgment and decree of the trial Court without adverting to the finding of the trial Court and without rendering a finding that the conclusion rendered by the trial Court are erroneous?

9. The Point:

The plaintiff claims his right and title in respect of the suit property measuring 0.16 cents out of 2 acres 10 cents in Survey No.418/2 in Pellakurichi Village, Ariyalur Taluk. EX A1 is the sale deed in respect of the plaint schedule property measuring 0.16 ½ cents in suit survey No. Property dated 21.9.1985 executed by Kulanthaivelu , son of Duraisamy Padaiyachi. The above said sale deed was registered on 27.9.1985.To show the possession in respect of the suit property, the plaintiff has filed Ex A2 joint patta in favour of the plaintiff and his vendor Kulanthaivelu dated 12.5.1986. Exs A3 and A4 are the land tax receipts in favour of the plaintiff dated 20.3.1986 and 8.2.1987 respectively. But Exs A2, A3, A4 are all subsequent to the filing of the suit in the year 1985. Ex A5, is the adangal extract for Fasli 1394 which shows that one Kumarasamy had raised crops in 2.6 acres. So it is clear that Ex A5 is not relating to the suit property. In the cross examination dated 14.7.1987, the plaintiff (P.W.1) would admit that Kumaraswamy mentioned in Ex A5, is the grand father of his vendor under Ex A1 Kulanthaivelu and that Kumarasamy died some 15 years back and Ex A5 is relating to Fasli 1394 = to the English Calendar era 1984. So Ex A5 is of no use to prove the case of the plaintiff as to show his vendor Kulanthaivelu was in possession of the suit property immediately before the execution of Ex A1 sale deed. EX A7 is relating to Fasli 1395 = to English Calendar era 1985. It shows that the plaintiff and his vendor Kulanthaivelu have cultivated 0.29.5 hectares of land in Survey No.418/2A and were in possession of o.26.5 hectares in Survey No.418/2B. But the suit survey Number is 418/2. It is not known when survey Number 418/2 was sub divided into 418/2A and 418/2B. There is absolutely no document produced by the plaintiff to show that his vendor Kulanthaivelu was in possession and enjoyment of 0.16 1/2cents in Survey Number 418/2 in the suit property.

9 a) The vendor of the plaintiff was examined as P.W.2 . The evidence in the cross examination throws some light in respect of his title in respect of the suit property. P.W.2 , the vendor Kulanthaivelu of the plaintiff would trace his title under an oral partition between him and his father. According to

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him, the oral partition between them took place three years prior to his deposition in the Court, ie.,it must be around 1984 or so. But he would admit that there is no document to show that a partition took place between them. He would further say that the total extent of the property partitioned was 33 cents and it was his ancestral property and he was allotted western 16 ½ cents and his father was allotted eastern 16 ½ cents. He would further state that 16 ½ cents in the eastern portion was sold by his father and mother and that he has no right in the eastern 16 ½ cents and that first and second defendants have purchased 16 ½ cents from his father and mother and that he had sold remaining 16 ½ cents to the plaintiff. But he has not handed over any patta to the plaintiff He would specifically depose that in Ex A1, he has mentioned that the property sold under Ex A1 was allotted to him towards his share in the partition. The above said deposition is diametrically opposite to the recitals in Ex A1. In Ex A1, there is no mention about the partition between Kulanthaivelu(P.W.1) and his father. If Kulanthaivelu was in possession and enjoyment of 16 ½ cents in the plaint schedule survey number property, consequent to the alleged oral partition between him and his father in or about 1984, certainly the mutation would have been effected and land tax would have been collected for 16 ½ cents separately from Kulanthaivelu (P.W.1) and also from his father. But the document Ex A3 to A7 are all subsequent to Ex A1 sale deed.

9b) Further it is pertinent to note from Ex A1 sale deed that the possession of 16 ½ cents was handed over to the plaintiff only on the date of execution of the sale deed ie., on 21.9.1985. But P.W.1(plaintiff) in his evidence in the chief examination has categorically stated that even before the execution of the sale deed, the possession was handed over to him on 17.9.1985 by his vendor . But Ex A1 is dated 21.9.1985 wherein it has been stated that only on the date of execution of the sale deed, the possession was handed over to the plaintiff. So as per the recitals in Ex A1 sale deed, it is clear that what P.W.1 has deposed before the Court to the effect that he is in possession of the suit property from 17.9.1985 itself cannot be true.

9c) On the other hand, the defendants have produced Ex B1 to show that they have purchased 75 cents out of 2 acres 10 cents in survey No.418/2. The executants of Ex B1 sale deed are Duraiswamy , his wife Meenakshi Ammal and their son Kulanthaivelu. Ex B5 is the settlement deed dated 3.10.1978 in favour of Meenakshi Ammal, the mother of Kulanthaivelu in respect of 41 cents out of 2 acres 10 cents in Survey No.418/2. Ex B5 is the settlement deed executed by the brothers of Meenakshi Ammal. A life estate has been given under the settlement deed in favour of Meenakshi Ammal and after her life , the property must devolve on her male children absolutely. It is well settled proposition

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of law that an absolute gift made subject to a condition restricting alienation the condition would be void.
Re Dugdale(1888) 38 Ch D176; Nabob Amiruddaula v Nateri (1876) 6 Mad HC 356(Mahomedan Law); Anantha v Nagamuthu(1882))ILR 4 Mad 200 (Hindu Law);Ali Hasan v Dhirja (1882)ILR 4 All 518;Bhaira v Paremshri (1885) ILR 7 All 516; Moulvi Muhammad v Fatima Bibi (1886)ILR 8 All 39, 12 IA 159 (Mahomedan law); Muthukumara v Anthony (1915) ILR 38 Mad 867,24 IC 120 (Hindu Law); Narayanan v Kannan(1884) 7 Mad 315 (Hindu Law-condition restraining partition)Jagdeo Sharma v Nandan Mahto AIR 1982 Pat 32.See note "restraint against alienation in a gift under s 10.
Mkund v Rajrup (1970) 4 ALLL IJ 708;Ma Yin Hu v Ma Chit May (1929)ILR 7 Rang 306, 119 IC737,AIR 1929 Rang 226.
Thakur Raghunath Ji Maharan v Ramesh Chandra (2201)5 SCC 18, AIR 2001 SC 2340 : State of Uttar Pradesh v Banshi Dhar AIR 1974 SC 1084
K.Balakrishna v K.Kamalam AIR 2004 SC 1257 para 11(2204) 1 SCC 581
1997(2)SCC 255.
There is no prohibition in law that ownership in property cannot be gifted without its possession and right of enjoyment.

10. The learned counsel appearing for the appellant relying on a decision reported in V.Parvathy-v-Ramakrishna Mission rep.by duly authorised Power Agent Swami Amirthanantha and four others (2001-3 L.W.1 182) and contended that while reversing the Judgment and decree of the trial Court, the lower Appellate Court has not given any reasoning. But a reading of the Judgment of the first Appellate Court will go to show that for the findings of the appellate Court in setting aside the findings of the trial Court, sound reasoning has been given in the Judgment of the first appellate Court. The learned counsel appearing for the appellant would contend that there is no finding in respect of the validity of Ex A1 document in the first Appellate Court's Judgment. But on a perusal of paragraph 12 of the Judgment of the first Appellate Court will clearly go to show that there is a definite finding by the learned first appellate Judge to the effect that Ex A1 is not a genuine document. Hence the above said dictum will not apply to the present facts of the case.

11. Relying on a passage at Paragraph 18 of a decision reported in V.Janarthanan-v- Alemelu Ammal (2007 1 MLJ 221) wherein it has been held as follows:

> " The third substantial question of law is whether the lower appellate Court has considered the oral and documentary evidence and legal position while reversing the considered judgment of the trial Court. When the lower appellate Court, while reversing the Judgment and decree of the trial Court had

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> ignored and misread important evidence on record and has failed to refer to the important features of the evidence and has also failed to give any reason to rebut the grounds taken and the reasons assigned by the trial Court and has rather failed to take stock of the entire materials on record, that decision is bad. While reversing the Judgment of the trial Court, the first appellate Court should consider the evidence and also reasonings of the trial Court and give its own reasons for not agreeing with the findings of the trial Court."

The learned counsel would further contend that the first appellate Court has not given any reasoning for setting aside the findings of the trial Court. The above said dictum is factually in applicable because for rejecting Ex A1, the First appellate Court has given reasoning at Paragraphs 11 and 12 of its Judgment. The learned first appellate Judge has rejected Ex A1 after applying the provisions contemplated under Section 53 A of the Transfer of Property Act and also on the basis of the evidence of P.W.1 which is diametrically opposite to the recitals found in Ex A1. Under such circumstances, it cannot be said that the first appellate Court has not considered the oral and documentary evidence while reversing the Judgment of the trial Court.

12. Ex B5 has been executed in the year 1978. After the enactment of Succession Act 1956, there is no bar for a woman to enjoy the property absolutely. There is no restriction under law for the absolute possession and enjoyment of an immovable property by a woman. So the condition imposed under Ex B5 Gift deed conveying only a life estate of Meenakshi Ammal itself is void and Meenakshi Ammal gets absolute right over 41 cents in Survey No.418/2. So the transfer of Meenakshi Ammal 's right in 41 cents in Survey No.418/2 under Ex B1 in favour of Defendants 1 and 2 is valid. But actually under Ex B1, 75 cents have been conveyed by Duraisamy, Meenakshi Ammal and Kulanthaivelu. Even if the case of Kulanthaivelu that he and his father Duraisamy were entitled to 37 cents in suit survey No.418/2 and that they orally partitioned the above said 37 cents in Survey No.418/2 getting each 16 ½ cents,that too was conveyed under Ex B1 sale deed in favour of defendants 1 and 2 since Duraisamy , the father of Kulanthaivelu, and also Kulanthaivelu, the vendor of the plaintiff have executed Ex B1 sale deed along with Meenakshi Ammal. EX B1 is dated 20.9.1985. EX A1 is dated 21.9.1985. Duraisamy , Meenakshi Ammal and Kulanthaivelu have also entered into an agreement of sale in respect of 75 cents out of 2 acres 10 cents in Survey No.418/2 on 4.2.1985 itself. So in pursuance

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of the sale deed under Ex B2 alone Ex B1 sale deed was executed. Under Ex B2 sale agreement a sum of Rs.29,000/- was agreed to be paid by the defendants 1 and 2 and a sum of Rs.9,000/- has been paid by defendants 1 and 2 to the vendors viz.,Duraisamy, Meenakshi Ammal and Kulanthaivelu on 4.2.1985 itself and subsequently on 16.6.1985 as per EX B3 endorsement a further sum of Rs.5,000/- has been paid by Defendants 1 and 2 to vendor under Ex B2 and the balance of consideration of Rs.15,000/- was paid by the defendants 1 and 2 to the vendors under Ex B1 sale deed viz., Duraisamy, Meenakshi Ammal and Kulanthaivelu. Kulanthaivelu has no right or title in respect of suit survey number property to execute Ex A1 sale deed in lieu of Ex B2 and Ex B1.

13. Section 53 A of the Transfer of Property Act runs as follows:

> "53 A Part Performance:- Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
> and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,
> and the transferee has performed or is willing to perform his part of the contract,
> then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract;
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

14. The plaintiff has taken a defence in this case that he has no notice about Ex B2 agreement of sale. The plaintiff has not taken any encumbrance certificate for the property. If he would have taken any encumbrance at least, he would have known

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about Ex B1 sale deed which was executed on 20.8.1985 and registered on 25.9.1985. Ex A1 was registered on 27.9.1985 ie., 2 days after the execution of Ex B1 sale deed. So as per the provision under Section 53 A of the Transfer of Property Act also the plaintiff cannot claim any right or title in respect of the suit property under Ex A1 sale deed.

15. Under such circumstances, I do not find any illegality or infirmity in the Judgment of the first appellate Court in A.S.No.142 of 1990 on the file of the Court of Subordinate Judge, Ariyalur. Point is answered accordingly.

16. In the result, the appeal is dismissed confirming the decree and Judgment in A.S.No.142 of 1990 on the file of the Court of Subordinate Judge, Ariyalur with costs through out.

Sg

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Subordinate Judge,Ariyalur

2. The District Munsif , Ariyalur.

3. The Record Keeper, VR Section,
High court , Madras.

1 CC TO M/S SARVABHAUMAN ASSOCIATES, ADVOCATES SR 3290

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